

# **2004 Post-1905 Curtailment Order:**

## **A Review of Issues and Recommendations**

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## **Introduction**

On June 10, 2004, Judge Stauffacher of the Yakima County Superior Court signed an Order limiting the use of water by Yakima River water right holders with rights having priority dates subsequent to May 10, 1905. The Order affected approximately 240 water rights. Owing to the impacts of the Order to the affected parties and some associated controversy, Judge Stauffacher directed the interested parties to meet with Ecology after the 2004 irrigation season to review implementation of the Order and to report to the Court by February 1, 2005 on any modifications to the Order for subsequent years.

This report is submitted by Ecology in response to the Court's direction. Several parties held an initial meeting on November 19, 2004 to discuss the process for preparing and submitting a report to the Court and developing modifications to the Order for subsequent years. At that meeting, participants scheduled five subsequent meetings in December and January. The group assigned responsibility for managing meetings and drafting the reports to individual participants. Ecology then placed a notice in the Court's December 1, 2004 newsletter announcing the times and locations of the five additional meetings.

This report is little more than a few highlights of the discussions. The parties hope that the report and its appendices will provide the Court with useful information and relatively complete documentation of the combined judicial and administrative processes the parties used to implement the Court's 2004 Order.

On January 24, 2005, the Roza Irrigation District (Roza) submitted to the Court a proposed Revised Order Limiting Post-1905 Diversions During Periods of Water Shortage. The Revised Order is the product of the interested parties' meetings and discussions during December and January. The content of the Revised Order is discussed in the Recommendations section of this report.

Special thanks should be given to the USBR, who graciously provided the meeting space, and to Tom Cowan, who managed the meetings. All the participants who came to the meetings to listen and to share their ideas also deserve our sincere thanks.

## **Events of 2004 Relative to Order Limiting Post-1905 Diversion During Periods of Shortage**

Water supply forecasts for the Yakima Basin early in the 2004 irrigation season predicted a shortage that would result in 70 to 85 percent prorationing for proratable water rights. An unusually wet August and September resulted in a full water supply forecast and an end to prorationing on September 20, 2004. Over the course of the 2004 irrigation season, proratable water users were restricted to between 82 and 100 percent of their full entitlement.

Roza petitioned the Yakima County Superior Court for an Order to curtail diversions by water rights that were junior to its May 10, 1905 rights. The basis for Roza's petition was

that consumptive use of water by post-1905 water users above the Yakima basin control point (usually Parker) reduces the Total Water Supply Available (TWSA), thereby reducing their supply of water. The Kennewick Irrigation District (KID) and Kittitas Reclamation District (KRD) and Sunnyside Division (Sunnyside) joined in Roza's petition. Many of the parties discussed key elements of the Roza proposed Order prior to the hearing by the Court. The parties reached a general understanding of the events that would initiate curtailment of the junior rights, however, not all parties supported application of curtailment to domestic or municipal users of water.

Ecology queried its adjudications database to identify all the confirmed claims in Conditional Final Orders (CFOs) issued by the Court with priority dates after May 10, 1905. Ecology also reviewed its own record to identify temporary permits issued since the adjudication began. These post-1905 water rights, consisting of approximately 240 water rights or temporary permits, and the notice letter they received are shown in Appendix 1 to this report.

Additionally, Ecology identified more than 600 claimants to the adjudication who had initially filed a claim with the Court, but for whom a right was not confirmed. Ecology notified these claimants of the Court's Order. The notification letter and a list of the claimants are attached as Appendix 2 to this report.

On June 10, 2004, the Court heard arguments regarding the Order proposed by Roza and the other moving parties. The Court signed the Order as proposed by Roza. It provided that all post-1905 water rights were curtailed, except those for non-consumptive uses, once the Yakima project was on storage control and prorationing was in effect. The Order is attached as Appendix 3 to this report.

Once the Order was signed, Ecology began field observations of the water users listed on Appendix 1. Ecology also researched the Appendix 2 list to identify the claimants that represented potentially large uses of water, particularly those upstream of the Parker gage on the Yakima River. Once Ecology determined the locations of the claimants with denied claims (the Court does not include detailed information in the CFO when claims are denied), Ecology performed field observations. Ecology provided reports summarizing the observations to the Court at two week intervals through early September. An example of a compliance report is attached as Appendix 4.

After the Order was signed, the Selah-Moxee Irrigation District (SMID) indicated to the Court that it was willing to provide water to several camps that are located in the upper Tieton River watershed. Appendix 5 identifies the organizations holding post-1905 rights that benefited from SMID's transfer of some of its water rights.

SMID indicated that it was also willing to make some of its water rights available to mitigate the use of water by other post-1905 water users. SMID documented hop lands within its service area that were not irrigated to produce a commercial crop in 2004 and placed the consumptive use savings into the State's trust water program. The trust water right was then available as TWSA mitigation for up to 44 ac-ft of out-of-priority

consumptive use by the potential participants in the program. Appendix 6 is the Court's Order approving water to be placed into the State instream flow trust water right program and it includes a list of the water users that benefited from participation in SMID's mitigation program. Nineteen domestic water systems serving 177 lots participated in the SMID mitigation program.

Seven water users successfully petitioned the Court to be exempted from the 2004 curtailment Order. These water users were located downstream of Chandler in Benton County and were determined to have no impact on TWSA. See Appendix 7.

By late September, the USBR determined that water supply conditions had changed for the better and included a note to that effect in its October TWSA forecast. Ecology proposed a motion and Order that would allow the post-1905 water users to resume the use of water and noted it for the October water day. The parties aired many perspectives at the hearing and drafted a proposed Order which Commissioner Ottem signed. See Appendix 8. The Order allowed some, not all, post-1905 water users to resume their use before October 31, 2004.

#### **Implementation Issues Associated with the June 10, 2004 Order**

At the November 19, 2004 meeting, the participants identified several questions or issues that they hoped to discuss over the course of the subsequent meetings. They included:

- ❖ What is the definition of a water shortage for proratable water users?
- ❖ When will curtailment be effective?
- ❖ When will curtailment end?
- ❖ What exceptions are there to curtailment?
- ❖ How will it be determined that the use of water by a post-1905 user will not impact senior or proratable water rights?

The question of whether domestic and municipal water uses are superior to senior rights for irrigation or other non-domestic uses was also discussed. However, given that a briefing schedule to bring this question to the Court has been established and is on a roughly parallel path with this effort, the participants did not attempt to resolve it.

In addition to the aforementioned questions identified at the first meeting, the participants expressed sufficient interest to make recommendations on the topics of:

- ❖ Compliance and enforcement of the Order
- ❖ Mitigation for out-of-priority uses
- ❖ Reservation of rights to seek additional curtailment or to seek any remedy available for enforcement or implementation of a water right

These subjects are discussed in some detail in the recommendations section of this report.

## **Recommendations**

The following table identifies the issues addressed by the interested parties after the 2004 irrigation season and summarizes the treatment of those issues in the proposed Revised Order (attached as Appendix 9). It also summarizes their treatment in the June 10, 2004 Order, noting any substantive changes. The proposed Revised Order was developed by the interested parties through the meetings and discussions described in the introduction to this report, and was submitted to the Court by the Roza on January 24, 2005.

<b>ISSUE NOTED IN SECTION 3</b>	<b>TREATMENT IN REVISED ORDER</b>	<b>TREATMENT IN JUNE 10, 2004 ORDER</b>
What is the definition of a water shortage for proratable water users?	When USBR implements prorationing	Same
When will curtailment be effective?	When USBR begins prorationing	Same
When will curtailment end?	On October 31, or when prorationing ends, if sooner	October 31
What exceptions are there to curtailment?	(1) Points of diversion below Prosser Dam; (2) Rights excepted by Order of Court; (3) Rights that Court determines have sufficient mitigation; (4) Rights that Court determines do not impair senior rights; (5) Rights designated as non-consumptive; (6) Water for emergency fire fighting	Same except for (1) and (3), which are new
How will it be determined that the use of water by a post-1905 user will not impact senior or proratable water rights?	Through motion to Court	Same
Compliance and enforcement of the Order	(1) Ecology to provide notice of curtailment to Post-1905 users; (2) Ecology to report to Court on non-compliance; (3) any party can request show cause hearing on non-compliance	Same except for (1), which is new
Mitigation for out-of-priority uses	Mitigation expressly identified as a basis for requesting Court to grant relief from curtailment	Implied, but not expressly addressed

ISSUE NOTED IN SECTION 3	TREATMENT IN REVISED ORDER	TREATMENT IN JUNE 10, 2004 ORDER
Reservation of rights to seek additional curtailment, enforcement and implementation	Expressly reserves rights of all parties to seek further curtailment on proof of impairment and to seek enforcement and implementation of rights	Implied, but not expressly addressed

### Enforcement

Ecology's experience with enforcement of minimum flow programs in north-central Washington suggests that compliance with the Order would be improved if the water users that are subject to the Order receive earlier notification of the probability of shortage conditions.

Ecology has used a two step process for nearly 20 years to improve compliance by the north-central Washington water right holders who are subject to minimum instream flows. When the March runoff forecasts are published by the River Forecast Center, Ecology reviews the forecast to determine if there is a significant chance for actual river flows to fall below the adopted instream flows during the upcoming irrigation season. Ecology then sends a letter to each affected water right holder indicating what the likelihood is for curtailments later in the year. As the onset of curtailments approaches, Ecology sends an Order requiring the water user to call a toll-free telephone number for instructions as to whether water may be diverted under their flow-conditioned permits.

A similar though not identical program can be employed in the Yakima basin. If the USBR March 1 forecast calls for prorationing during the following irrigation season, Ecology could notify each post-1905 water right holder. As the date of prorationing approaches, Ecology could send another letter or notice informing post-1905 water right holders to check Ecology's website and toll-free telephone number to confirm that prorationing has begun. This second letter would further instruct water users to either curtail their use or to continue if they have Court-approved mitigation for their out-of-priority use.

Field compliance checks would be conducted by Ecology to determine water user compliance with the Court's Order. Periodic compliance reports would be filed with the Court in the same manner as during the 2001 and 2004 irrigation seasons.

### Mitigation

A post-1905 water user can respond to the Court's Order in at least three lawful ways:

- ❖ Curtail the water use allowed under the post-1905 water right for the period of curtailment.

- ❖ Obtain a May 10, 1905 or earlier priority date water right and transfer it to replace the post-1905 right either temporarily or permanently – in effect exiting the class of post-1905 water users.
- ❖ Mitigate the water supply impacts so that impairment to the senior water rights does not occur as a result of the exercise of the post-1905 water right.

The following discussion examines one of the potential responses a post-1905 water user can choose to put into action – mitigation for the out-of-priority use of a post-1905 right.

The temporary transfers in 2004 took two basic forms. The SMID water right changes in Appendices 5 and 6 illustrate each form. One was the temporary change of an acquired senior water right from a hop vineyard near Yakima fallowed for the irrigation season to replace several post-1905 domestic water rights (Appendix 5) held by not-for-profit camps in the upper Tieton basin. The other form was the temporary change of an irrigation water right into the trust water program for instream flow purposes to mitigate or offset the continued out-of-priority consumptive use by 19 domestic or municipal water systems with post-1905 rights at a variety of locations in the Yakima basin (Appendix 6).

Experience gained during 2004 shows that mitigation for out-of-priority water use can be an effective way to respond to periodic shortages and maintain water budget neutrality with regard to the TWSA. Mitigation for TWSA can resolve the impacts of out-of-priority consumptive use on TWSA but water users other than the proratable right holders may also place calls on water. The effectiveness of mitigation to satisfy calls for water by other senior users would depend largely on the location and priority date of the right acquired and placed into trust for mitigation.

Temporary mitigation can be effective in many instances; however, the transaction costs associated with annual leases and transfer of the leased water are substantial. Where the volume of leased water is very small, the transaction costs may be many times the value of the water right acquired to accomplish the mitigation.

An offer like SMID's 2004 offer to provide a source of temporary mitigation water to multiple post-1905 water users greatly lowers the transaction costs for willing buyers of temporary mitigation water and for agencies to assess the proposed water right transfer. A significant hurdle associated with timely and affordable temporary mitigation is the lack of a defined process for potential sellers to easily announce themselves to potential buyers. If early notice of impending water shortage conditions is given to potential sellers and buyers, and sellers and buyers have an effective means to identify each other, then agreement between sellers and buyers could be executed more quickly than the agreements completed in 2004 and prior years. Consequently, temporary mitigation could allow for uninterrupted water use if it is arranged early in an irrigation season so that all necessary approvals are in place when prorationing begins.

Permanent mitigation by acquisition of a pre-1905 water right and placement of it into trust to offset the out-of-priority post-1905 use would provide improved long-term

certainty against calls for water by proratable water users. Initially, the cost of the permanent mitigation would be higher than for equivalent temporary mitigation. However, over the long term, transaction costs would be much lower because they would be incurred only once. Permanent water right changes would also require lower transaction costs as compared to a series of annual temporary changes.

#### Reservation of Rights to Seek Additional Curtailment or Other Remedies

As noted in the table, the proposed Revised Order expressly reserves rights of all parties to seek further curtailment on proof of impairment and to seek enforcement and implementation of rights. While these rights are inherent in western water law, the parties felt it was important to expressly restate them in the context of the Revised Order.

The meeting participants recognize that changes in conditions over time may make curtailment some junior water rights necessary in the future, even though, under this Order, curtailment is not necessary under present conditions. Therefore, the senior right holders should retain the ability to revisit exceptions to the current Order or the proposed Revised Order attached as Appendix 9, and to seek curtailment of any party by the exercise of any other remedies otherwise available outside of this Order for enforcement or implementation of any water right.

This reservation of rights is consistent with and a logical counterpoint to the process available to post-1905 water right holders whereby they may demonstrate that curtailment of their use is not necessary to protect TWSA or the rights of senior users.